

The ALJ sent the parties a letter dated April 16, 2009, which noted that the Board Member's Order indicated claimant had suffered a temporary aggravation and the decision

was entered before the independent medical evaluation (IME) report had been received. The ALJ further noted the IME was to address the question regarding causation of what, if any, medical treatment was required as a result of the accidental injury. The ALJ then advised the parties that it was his intent to issue a subsequent order upon receipt of the IME report. The ALJ noted in pertinent part:

As I understand the April 9, 2009 order by the Board, there is no reason why the IME process should not proceed. It was my intent for the January, 2009 order for temporary total disability to serve as an interim order until Dr. Bernhardt issued his report. It remains my intent to issue a subsequent order regarding claimant's request for medical care and temporary total disability after receiving Dr. Bernhardt's report. The IME report stems from the previous hearing and will be considered as part of the January of 2009 proceedings and of any subsequent proceeding scheduled by the claimant, should one be necessary.

Dr. Bernhardt's IME dated April 7, 2009, was filed with the ALJ on April 27, 2009. On April 28, 2009, the ALJ issued an Order awarding claimant temporary total disability compensation and medical treatment. The ALJ found:

Claimant did suffer an accident injury. Claimant's alleged accidental injury did arise out of and in the course of employment. Although Dr. Bernhardt's report is somewhat confusing, it is clear that claimant aggravated a pre-existing condition on 9/24/08.¹

Respondent requests review of whether the ALJ has jurisdiction to issue an order regarding compensability when the Board had entered an order regarding the same issue. Respondent further requests review of whether claimant sustained an accidental injury arising out of and in the course of employment. Respondent argues the September 2008 event did not aggravate claimant's preexisting low back condition because there was no change in pathology or physical structure.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, respondent argues the ALJ did not have jurisdiction to review the issue of compensability as the Board Member's April 10, 2009 decision determined the claimant had not suffered a compensable injury. This Board Member disagrees.

¹ ALJ Order (Apr. 28, 2009) at 1.

As provided by the Workers Compensation Act, preliminary hearing findings are not final or binding but, instead, are subject to modification upon a full hearing on the claim.² And, as there is no limit to the number of preliminary hearings that may be conducted during the trial of a workers compensation case, this would apply to subsequent preliminary hearings and rehearings as well. Because there is no limit to the number of preliminary hearings that can be held in any given workers compensation matter,³ the decision of whether a claim is compensable, i.e. whether an injury arose out of and in the course of one's employment, can change based upon the evidence offered. This ongoing review, while contrary to general civil litigation principles, is a necessary procedure in the workers compensation field. Generally, however, where the compensability issue has already been decided at a preliminary hearing, the issue would not need to be addressed again absent new evidence or a legal theory not previously presented. Of course the extent to which these issues are to be relitigated at a subsequent preliminary hearing or rehearing is within the ALJ's discretion.

In this instance, the new evidence was Dr. Bernhardt's IME report. And it was within the ALJ's jurisdiction to address the issue of compensability based upon the additional evidence.

Turning to the issue of compensability, this Board Member adopts and incorporates herein the Findings of Fact in Board Member Whittier's April 10, 2009 Order in this claim. The parties are well aware of the facts and the only new evidence consists of Dr. Bernhardt's IME .

Dr. Bernhardt performed a physical examination and diagnosed claimant as having chronic low back pain; chronic lumbar radiculitis, right leg; degenerative lumbar disk disease, multiple levels; and Sheuremann's infraction of adolescence. At the time of Dr. Bernhardt's evaluation, claimant was in need of additional treatment, i.e. pain management. The doctor opined that there was no change in claimant's imaging studies to account for his new symptoms. Dr. Bernhardt recommended repeat epidural steroid injections since claimant had benefitted from them in the past. He further opined that if claimant did not improve with the pain management measures then he should be released from active care with permanent restrictions. Dr. Bernhardt opined, "With respect to causation, I do not think he would require this treatment but for his pre-existing degenerative lumbar disk disease."

In the April 10, 2009 Order, Board Member Whittier found in pertinent part:

² K.S.A. 44-534a(a)(2).

³ *Hanna v. M. Bruenger & Co., Inc. & Leona Bruenger & Co., Inc.*, No. 222,182, 1997 WL 802901 (Kan. WCAB Dec. 19, 1997).

As in *Gillig*, claimant's preexisting condition had never healed. Similarly, in *Logsdon*, the Kansas Court of Appeals noted that the claimant's condition had improved after surgery but it never returned to its full potential and had continued to cause claimant problems on a regular basis. The expert medical witness testimony was that absent the preexisting condition and prior injury, claimant would most likely not have suffered the most recent injury from such a trivial event. Applying the direct and natural consequence rule, the court found the new injury was compensable as a direct and natural consequence of the prior injury.

Given the ongoing nature of claimant's preexisting problems as evidenced by the claimant missing work and undergoing treatments in March through June 2008, and considering the relatively minor trauma claimant experienced on September 24, 2008, this Board Member finds that claimant's current condition is a direct and natural consequence of his prior injuries and degenerative back condition. This worsening of claimant's condition would have occurred even absent the incident on September 24, 2008. Furthermore, driving over a bump in the road most likely would not be characterized as "a distinct trauma-inducing event out of the ordinary pattern of life" but instead was "a mere aggravation of a weakened back."⁴ Based upon the record presented to date, claimant has failed to prove that this claim is compensable.

Dr. Bernhardt's report supports this reasoning as he concluded claimant's current need for treatment is a direct and natural consequence of his preexisting degenerative back condition. And there was no change in the diagnostic studies to account for his new symptoms. This Board Member finds claimant has failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order for Compensation of Administrative Law Judge Brad E. Avery dated April 28, 2009, is reversed.

IT IS SO ORDERED.

⁴ *Logsdon*, 35 Kan. App. 2d at 84 (quoting *Graber*, 7 Kan. App. 2d 726, Syl.).

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2008 Supp. 44-555c(k).

Dated this 26th day of June, 2009.

DAVID A. SHUFELT
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
M. Joan Klosterman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge